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IFCI LTD v. ARCHIPELAGO INSURANCE LTD

COURT OF APPEAL, PUTRAJAYA
NOR BEE ARIFFIN JCA
NORDIN HASSAN JCA
SEE MEE CHUN JCA
B [CIVIL APPEAL NO: W-02(IM)(NCC)-1854-12-2020]
22 DECEMBER 2021

Abstract – *An application for extension of time to file a statement of defence is 'a step in the proceedings' within the meaning of s. 10(1) of the Arbitration Act 2005. It follows that the second defendant, in requesting for such extension of time, had taken a step in the proceedings. It follows further that the High Court had erred in deciding otherwise, and in granting stay and invoking the section.*

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CIVIL PROCEDURE: *Appeal – Appeal against High Court judgment – Setting aside High Court decision allowing stay of proceedings on ground matter to be referred to arbitration – Whether party sought dispute to be referred to arbitration had taken 'steps in the proceedings' – Whether request for extension of time in filing statement of defence amounted to 'steps in the proceedings' – Arbitration Act 2005, s. 10(1)*

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WORDS & PHRASES: *'Steps in the proceedings' – Arbitration Act 2005, s. 10(1) – Whether request for extension of time for filing statement of defence amounted to 'steps in the proceedings'*

F IFCI Ltd ('appellant'), a company incorporated in India, granted a short-term loan amounted to INR552,400,000 to Gouttephone Technology Private Ltd ('GTPL'). As security for the loan, GTPL assigned all of its rights and benefits under a promissory note, in the value of USD10 million to the appellant. As provided under such, the first defendant, Bishopgate Capital
G Ltd (not a party to the current appeal), promised to pay the said sum to the appellant on the promissory note's maturity date, 19 November 2018. The respondent, Archipelago Insurance Ltd, a company incorporated in Labuan, pursuant to a credit default risk insurance policy ('AIL policy'), agreed to indemnify the appellant against any losses arising in the event of default of
H the promissory note. Nevertheless, GTPL defaulted the loan, and, after it failed to remedy the default, requested the appellant to redeem the promissory note. However, after the redemption process was carried out, the first defendant failed to effect any payment to the appellant. This prompted the appellant to lodge a claim against the respondent in the sum of INR572,457,085 under the AIL policy, to recover the losses it suffered due
I to the first defendant's default. However, the respondent also failed to make

any payment to the appellant. Due to this, the appellant and the respondent as representative of the first defendant, entered into a settlement agreement. According to the settlement agreement, the first defendant was to make two separate payments to the appellant: (i) INR6,250,000 on or before 31 March 2019 ('payment (i)'); and (ii) INR618,750,000 ('payment (ii)'). Payment (i) was made by the first defendant, but, payment (ii) was not. As a result, on a later date, the plaintiff filed a writ and statement of claim for the following: (i) as against the first defendant, the balance settlement sum of INR618,750,000; and (ii) as against the respondent, the sum of INR572,457,085 being the appellant's insurance policy under the AIL policy, or alternatively, the balance settlement sum of INR618,750,000 ('suit'). Subsequently, the respondent entered its appearance in respect of the suit, and thereafter, also requested for extension of time twice, to file its statement of defence until 10 February 2020. On the requested date, the respondent did file its statement of defence. In response, the appellant filed its reply to statement of defence. Nevertheless, on 11 March 2020, the respondent filed an application at the High Court, seeking a stay of the suit, to refer the said suit to arbitration pursuant to s. 10(1) of the Arbitration Act 2005 ('AA'). The respondent's application was allowed, hence, the appellant's current appeal. In supporting its appeal, that stay to the suit should not have been given by the High Court, several grounds were raised by the appellant, *inter alia*: (i) since the respondent had requested for extension of time in filing its statement of defence twice, the respondent had taken steps in the proceedings and submitted to the jurisdiction of the High Court as envisaged under s. 10(1) of the AA. Therefore, the avenue of arbitration was no longer available to the respondent; (ii) there was no express reservation of rights on the part of the respondent to arbitration in the filing of its statement of defence; and (iii) the best forum to hear the current matter was the court and not the arbitration tribunal considering the fact the first defendant in the suit was not a party in the AIL policy.

Held (allowing appeal; setting aside High Court decision)
Per Nordin Hassan JCA delivering the judgment of the court:

(1) The respondent had requested for extension of time twice in filing its statement of defence. As was held by the Federal Court in *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor*, this amounted to a step in the proceedings. Moreover, the respondent had also filed its statement of defence and served it on the appellant, to which the same had served the reply. The service by the respondent was clearly a step taken in the proceedings, and, indicated that the respondent elected to submit to the jurisdiction of the High Court. As such was the case, the respondent had waived its right to refer the dispute to arbitration. The respondent's application for stay of the suit under s. 10(1) of the AA was bereft of basis. (paras 25 & 26)

(2) The facts showed that when the respondent sought the extension, it had not mentioned its intention to refer the dispute to arbitration pursuant to the arbitration clause of the AIL policy. The application for stay was only made six days after the appellant served its reply to the respondent's statement of defence. This could not be said to be a prompt action or a clear indication on the part of the respondent to refer the matter to arbitration. Further, the express reservation in the statement of defence did not discard or dilute the requirement under s. 10(1) of the AA, that the application for stay of proceedings must be made before any steps in the proceedings were taken. (para 29)

(3) The first defendant was a not a party to the arbitration clause under the AIL policy. As the dispute involved a party and a non-party to the arbitration agreement, the best forum to hear the dispute would be the court, so as to avoid split litigation. (para 33)

(4) The High Court erred in allowing the stay of proceedings pursuant to s. 10(1) of the AA which warranted an appellate intervention. Therefore, the High Court decision was set aside, and, the appeal allowed with costs of RM15,000 to be paid by the respondent to the appellant subject to payment of allocator fee. (para 39)

Case(s) referred to:

Bina Jati Sdn Bhd v. Sum-Projects (Brothers) Sdn Bhd [2002] 1 CLJ 433 CA ***(refd)***
CLLS Power System Sdn Bhd v. Sara-Timur Sdn Bhd [2015] 1 LNS 149 HC ***(refd)***
Dr Koay Cheng Boon v. Majlis Perubatan Malaysia [2012] 4 CLJ 445 FC ***(refd)***
Gan Boon Aun v. PP [2016] 6 CLJ 647 FC ***(refd)***
Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd & Ors [2019] 7 CLJ 395 FC ***(refd)***
Linde Gas Malaysia Sdn Bhd v. Pasifik Utama Sdn Bhd & Anor [2011] 5 CLJ 40 CA ***(refd)***
Mun Seng Fook v. AIG Malaysia Insurance Bhd [2018] 8 CLJ 394 HC ***(refd)***
PP v. Sihabduin Hj Salleh & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 FC ***(refd)***
Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor [2002] 3 CLJ 213 FC ***(refd)***
Usahabina v. Anuar Yahya [1998] 2 CLJ Supp 131 HC ***(refd)***
Vengadasalam v. Khor Soon Weng & Ors [1985] 1 LNS 46 SC ***(refd)***
Winsin Enterprise Sdn Bhd v. Oxford Talent (M) Sdn Bhd [2010] 3 CLJ 634 HC ***(refd)***
Yeo Eng Lam v. Infinity Vantage Sdn Bhd [2020] 6 CLJ 616 CA ***(refd)***

Legislation referred to:

Arbitration Act 1952 (repealed), s. 6
Arbitration Act 2005, s. 10(1)
Rules of Court 2012, O. 12 r. 10(1), (2), (7), O. 18 r. 2(1), O. 69 r. 10

For the appellant - Vijay Raj & Ng Kar Man; M/s Skrine
For the respondent - Trevor George De Silva & Wong Leong Hong; M/s The Law Office of LH Wang

[Editor's note: For the High Court judgment, please see IFCI Ltd v. Bishopgate Capital Ltd & Anor [2021] 1 LNS 897 (overruled).]

Reported by Syamim Ariffin

JUDGMENT

Nordin Hassan JCA:

[1] This is the appellant's appeal against the decision of the High Court in allowing the respondent's application for a stay of proceedings pursuant to s. 10(1) of the Arbitration Act 2005 ('the Act'). In the court below, the appellant was the plaintiff, Bishopgate Capital Limited the first defendant and the respondent was the second defendant. Parties will be referred to as they were at the High Court.

[2] The main issue in the present appeal is fairly straightforward which pertains to the interpretation of the words "any other steps in the proceedings" in the Act and whether the second defendant had taken any other steps in the proceedings filed by the plaintiff against it. Consequentially, whether the Judicial Commissioner was right in her finding that the second defendant has not taken any steps in the proceedings which entitled it to the stay of proceedings under s. 10(1) of the Act.

Background Facts

[3] The salient facts in the present appeal are as follows. The plaintiff, a company incorporated in India, granted a short-term loan in the sum of INR552,400,000 to Gouttephone Technology Private Limited ('GTPL'). GTPL in turn, assigned all its rights and benefit under a promissory note in the value of USD10,000,000 to the plaintiff as security for the loan.

[4] As provided under the promissory note, the first defendant *inter alia* promised to pay the holder of the promissory note the sum of USD10,000,000 on its maturity date which was on 19 November 2018.

[5] The promissory note was insured by the second defendant, a company incorporated in Labuan, pursuant to a Credit Default Risk Insurance Policy dated 20 November 2017 issued by the second defendant ('the AIL Policy'). The policy, among others, provides that the second defendant agreed to indemnify the plaintiff against losses arising from any default of the promissory note.

[6] Thereafter, GTPL was in default of the loan resulting in the plaintiff issuing a notice for event of default to GTPL on 18 October 2018. Having failed to remedy the default, GTPL requested the plaintiff to redeem the promissory note. The redemption process was carried out by the plaintiff on 10 November 2018 but the first defendant failed to make any payment to the plaintiff in accordance with the terms of the promissory note.

[7] The plaintiff then lodged its claim with the second defendant on 22 November 2018 in the sum of INR572,457,085 under the AIL Policy to recover losses it incurred arising from the first defendant's default. However, the payment sought has not been paid by the second defendant.

[8] On 22 March 2019, the plaintiff and the second defendant executed an amicable settlement agreement. The second defendant entered this settlement agreement as representative of the first defendant. The terms of the settlement agreement provide *inter alia* that the first defendant was to pay the plaintiff INR6,250,000 on or before 31 March 2019 and INR618,750,000 on or before 31 May 2019.

[9] Pursuant to the settlement agreement, on 2 April 2019, the first defendant paid INR6,250,000 to the plaintiff but failed to make the payment of INR618,750,000 as agreed in the agreement.

[10] Consequently, the plaintiff filed a writ and statement of claim against the first and the second defendants claiming the following:

(i) as against the first defendant, the balance settlement sum of INR618,750,000;

(ii) as against the second defendant, the sum of INR572,457,085 being the plaintiff's insurance policy claim under the AIL Policy or alternatively, the balance settlement sum of INR618,750,000.

[11] On 8 January 2020, the second defendant entered its appearance in the plaintiff's suit and at a case management on 16 January 2020, counsel for the second defendant requested for an extension of time to file the statement of defence until 7 February 2020. Further extension of time was requested by the second defendant until 10 February 2020.

[12] Thereafter, on 10 February 2020, the second defendant filed its statement of defence and served it on the plaintiff. The plaintiff then filed its reply to the statement of defence and served it on the second defendant on 5 March 2020.

[13] Eventually, on 11 March 2020, the second defendant filed an application to stay proceedings in the plaintiff's suit and to refer the dispute to arbitration pursuant to s. 10(1) of the Act. The application was allowed by the High Court on 5 November 2020 and hence the present appeal.

The Appeal

[14] In the present appeal, the plaintiff's main contention essentially was that the second defendant had taken steps in the proceedings of the plaintiff's suit when the second defendant requested twice for an extension of time to file the statement of defence and filing as well as serving the statement of defence on the plaintiff. It was submitted that such steps amount to a submission to the jurisdiction of the High Court and as such, the second defendant was no longer in a position to apply for stay of proceedings under s. 10(1) of the Act.

[15] Conversely, counsel for the second defendant submitted in essence, that the request for extension of time to file the statement of defence and the filing of the same cannot be regarded as taking steps in the proceedings as envisaged under s. 10(1) of the Act. It was the second defendant's contention and agreed by the Judicial Commissioner that the request for extension of time to file the statement of defence and its filing was merely to preserve the position so that judgment in default will not be entered against the second defendant.

[16] In determining the issue at hand, the main statutory provision for consideration is s. 10(1) of the Act which states:

> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement **shall**, where a party makes an application **before taking any other steps in the proceedings,** stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. (emphasis added)

[17] The usage of the word 'shall' in this provision clearly dictates its mandatory application in comparison with the previous s. 6 of the repealed Arbitration Act 1952 which used the word 'may' indicating the discretionary power of the court. Section 6 stated:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration or any person claiming through or under him in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, **before taking any other steps in the proceedings,** apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, **may** make an order staying the proceedings. (emphasis added)

[18] Coming back to s. 10(1) of the Act, reading its clear wordings, the requirements for its application are, firstly, there is an arbitration agreement between parties involved and secondly, the application for stay of proceedings must be made before taking any other steps in the proceedings. The exemption for the application of this provision is that the agreement is null and void, inoperative or incapable of being performed.

[19] In the present case, the AIL Policy contained an arbitration clause which states:

> 5.5.1 any disputes, controversy arising out of or relating to the AIL Policy, or the breach, termination or invalidity thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Kuala Lumpur Regional Centre for Arbitration;

[20] In any event, the existence of this arbitration agreement is undisputed by the parties. The only issue here is whether the second defendant has taken any other steps in the proceedings in the plaintiff's suit as envisaged under s. 10(1) of the Act.

[21] In dealing with the issue as to what constitute "any other steps to the proceedings", it is instructive to make reference to the often-quoted Federal Court case of *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor* [2002] 3 CLJ 213 at pp. 213; [2002] 2 MLJ 625 at p. 638, where it was succinctly explained as follows:

> … Therefore, the legal position in Malaysia may be neatly summarised as follows:
>
> (a) the entry of appearance is the mandatory procedural step to be taken by an applicant in proceedings in the High Court. It is a step in the proceedings as required by the RHC. However, it is a permitted, excluded or an exempted step in the proceedings that does not amount to a step in the proceedings within the meaning of the s. 6 of the Act which would prejudice the applicant's right to apply for a stay of the proceedings;
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> (b) *if the applicant has served any pleadings, then he has clearly taken a step in the proceedings within the meaning of s. 6 of the Act. He has thereby elected to proceed with the proceedings in the High Court and would be barred from applying for a stay of proceedings to refer the dispute to arbitration;*
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> (c) if he has taken any other action in the proceedings (other than steps (a) or (b) above-mentioned), *the court will then have to consider whether such action amounts to a step in the proceedings by determining the nature of the action and whether or not it indicates an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed of by arbitration.* (emphasis added)

[22] Further, the Federal Court in the same case, in discussing the High Court case of *Usahabina v. Anuar Yahya* [1998] 2 CLJ Supp 131; [1998] 7 MLJ 691 opined that the act of requesting for an extension of time to file the statement of defence is a step taken in the proceedings. At p. 221 (CLJ); p. 631 (MLJ) of the case, this is what Mohtar Abdullah FCJ has to say:

> ... At this juncture, we note the existence of one salient fact in *Usahabina* which was mentioned in passing by the learned JC, but unfortunately not properly appreciated by him. It is this fact. In that case, the defendant who had entered an unconditional appearance failed to file his defence within the time limited for doing so. He had requested for, and the plaintiff had agreed to, an extension of one week to file the defence. *Pausing here for a moment, what the defendant did was clearly a step in the proceedings within the meaning of s. 6 of the Act by requesting an extension of time to file the defence, clearly indicating an intention to deliver a statement of defence, thus abandoning the right to arbitration* (see *Ford's Hotel Co v. Bartlett* [1896] AC 1). (emphasis added)

[23] The decision in *Sanwell Corp* (*supra*) on this issue was followed by the High Court *inter alia* in *Winsin Enterprise Sdn Bhd v. Oxford Talent (M) Sdn Bhd* [2010] 3 CLJ 634, *CLLS Power System Sdn Bhd v. Sara-Timur Sdn Bhd* [2015] 1 LNS 149; [2015] 11 MLJ 485, and *Mun Seng Fook v. AIG Malaysia Insurance Bhd* [2018] 8 CLJ 394; [2019] 7 MLJ 59.

[24] In *Winsin Enterprise* (*supra*), Mary Lim J (as Her Ladyship was, now FCJ) said this:

> [17] *From the evidence it is clear that the defendant sought and was granted by the plaintiff an extension of time to 21 July 2008 to serve and file the defence. Having evinced such an intention to the plaintiff s. 10(1) is no longer available to the defendant. This would be the position whether under the new or old law. In fact, I am inclined to go further to say that because of the language deployed in s. 10(1) where stay is now mandatory, subject to the reservations as earlier discussed, applicants who seek to rely on an arbitration agreement must make the application for stay promptly, even before the filing of an appearance.* (emphasis added)

[25] Reverting to the present case, the second defendant had requested twice for an extension of time to file its statement of defence. This request for an extension of time to file the defence, as was held by the Federal Court in *Sanwell Corp* (*supra*), is a step in the proceedings indicating an intention to deliver a statement of defence, thus abandoning the right to arbitration.

[26] Further, the second defendant has filed its statement of defence in court and served it on the plaintiff to which the plaintiff had also served its reply. This service of pleading by the second defendant is clearly a step taken in the proceedings of the plaintiff's suit and an indication that the second defendant elected to proceed with the proceedings in High Court and submit to the jurisdiction of the High Court. Therefore, the second defendant has waived its right to refer the dispute to arbitration and its application for stay of proceedings pursuant to s. 10(1) of the Act is bereft of any basis.

[27] This court in *Linde Gas Malaysia Sdn Bhd v. Pasifik Utama Sdn Bhd & Anor* [2011] 5 CLJ 40 reiterated the principle enunciated in *Sanwell Corp* (*supra*) and held as follows:

> [37] On learned counsel's submission that the defendants had to file their statement of defence because of the claim in respect of the supply agreement which contained no arbitration clause, *it is trite law that if a defendant has served any pleadings, then he has clearly taken a step in the proceedings and has thereby elected to proceed with the proceedings in court and would be barred from applying for a stay of proceedings to refer the dispute to arbitration.* (See *Sanwell Corporation v. Trans Resources Corporation Sdn. Bhd. & Anor* [2002] 3 CLJ 213 FC). (emphasis added)

[28] On the same issue, the second defendant submitted that there was an express reservation of its rights to arbitration in its statement of defence and its filing of the same was merely to avoid judgment in default being entered against it.

[29] With regards to the second defendant's contention on the reservation of rights to refer the dispute to arbitration, the facts show that when the second defendant sought the extension of time to file the statement of defence, the second defendant did not mention its intention to refer the dispute to arbitration pursuant to the arbitration clause in the AIL Policy. The application for stay of proceedings was only made six days after the plaintiff has served its reply to the second defendant's statement of defence. This cannot be said a prompt action by the second defendant or a clear indication to refer the matter to arbitration. Furthermore, the express reservation in the statement of defence does not discard or dilute the requirement under s. 10(1) of the Act that the application for stay of proceedings must be made before taking any other steps in the proceedings.

[30] In *Yeo Eng Lam v. Infinity Vantage Sdn Bhd* [2020] 6 CLJ 616; [2020] 4 MLJ 835, this court had decided that the defendant had taken steps in the proceedings when filing an application to disqualify the plaintiff's solicitor and filing the statement of defence and its counterclaim, although the defendant has made an express reservation to refer the matter to arbitration in its statement of defence.

[31] In this regard, we agree with counsel for the plaintiff that the Judicial Commissioner fell into error in distinguishing *Yeo Eng Lam* case (*supra*) merely because two steps had been taken in the proceedings by the defendant in that case. Perusing the authorities alluded to earlier, the number of steps taken is immaterial as the pertinent consideration is whether there are any other steps taken in the proceedings as envisaged under s. 10(1) of the Act. In any event, in the present case, we find the first step in the proceedings taken by the second defendant was the request for an extension of time to file the statement of defence and secondly, the filing and the serving of the same on the plaintiff.

[32] The wordings of s. 10(1) is plain and unambiguous *inter alia* that the application for stay of proceedings must be made before taking any other steps in the proceedings. As such, it must be given their natural and ordinary meanings. (see: *Dr Koay Cheng Boon v. Majlis Perubatan Malaysia* [2012] 4 CLJ 445 (FC) and *PP v. Sihabduin Hj Salleh & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82 (FC)). It is also trite law that a court should not read words into an Act of Parliament unless there is clear reason for it found within the Act itself. (see: *Gan Boon Aun v. PP* [2016] 6 CLJ 647 (FC), *Vengadasalam v. Khor Soon Weng & Ors* [1985] 1 LNS 46; [1985] 2 MLJ 449 (SC))

[33] The other important issue in this appeal is that the first defendant in the plaintiff's suit is not a party to the arbitration clause under the AIL Policy. Thus, as the dispute involves a party and a non-party to the arbitration agreement, we agree with the plaintiff's contention that in the

circumstances, it is best the dispute be dealt with by the court to avoid split litigation as explained by the Federal Court in *Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd & Ors* [2019] 7 CLJ 395 in the following words:

> [59] We shall next focus on the argument with respect to multiplicity of proceedings and risk of inconsistent findings. The Court of Appeal held that the issue of multiplicity of proceedings and possibility of inconsistent findings as expounded in *Bina Jati*, *supra*, are no longer material factors to oust the jurisdiction of an arbitrator under Act 646 in view of the decision in *J. Jarvis*. The High Court in *J. Jarvis*, we apprehend, said that all of those observations relating to concurrent proceedings and the risk of inconsistent findings were true but it was an inevitable consequence of the mandatory language of s. 9 of the UK Arbitration Act 1996 that from time to time there would be concurrent proceedings in court and before an arbitrator. The decision of the Court of Appeal in the instant action, in our view, effectively sets to naught the principles laid down by the same court in the case of *Bina Jati, supra* and as affirmed by the Federal Court in the case of *Chase Perdana Bhd. v. Pekeliling Triangle Sdn. Bhd. & Anor* [2008] CLJ 313; [2007] 7 MLJ 677 that *where some are parties and others are not parties to the arbitration it is best that their disputes be dealt with by the court and that disputes between parties cannot be divided so that part is dealt with by arbitration and another part in court. In short, what the Court of Appeal and the Federal Court in both cases are trying to emphasise is that the risks inherent in split litigation ought to be avoided.* (emphasis added)

[34] In *Bina Jati Sdn Bhd v. Sum-Projects (Brothers) Sdn Bhd* [2002] 1 CLJ 433; [2002] 2 MLJ 71, this court, on the same issue said this:

> *Where some are parties and others are not parties to the arbitration it is best that their disputes be dealt with by the court.*
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> In *The 'Eastern Saga'; Oxford Shipping Co Ltd v. Nippon Yusen Kaisha* [1984] 3 All ER 835, the court held:
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> > Since arbitration is a private procedure it is an implied term of an arbitration agreement that strangers to the agreement are excluded from the hearing and conduct of an arbitration under the agreement. *In the absence of the consent of all parties an arbitrator has no power to order that a dispute referred to arbitration under the agreement be heard or determined with another dispute involving a stranger which has been referred to arbitration under a different agreement, even though the two disputes are closely related and a consolidated hearing would be convenient'* (see also *Bauer (M) Sdn. Bhd. v. Daewoo Corporation* [1999] 4 MLJ 545 at p 561 (CA); *The 'Vimeira'; Interbulk Ltd v. Aiden Shipping Co Ltd* [1984] 2 Lloyd's Rep 66 at p 75).
>
> *Moreover, disputes between parties cannot be divided so that part is dealt with by arbitration and another part in court.* (emphasis added)

[35] Apart from this, there is also an alternative claim by the plaintiff against the second defendant which arose from the settlement agreement. This settlement agreement does not contain an arbitration clause for the application of s. 10(1) of the Act. As such, stay of proceedings for the alternative claim does not arise. Again, there should not be split litigation in the plaintiff's suit.

[36] For completeness, the plaintiff has made reference to O. 12 r. 10(7) of the Rules of Court 2012 and submitted that under this provision the 14 days period under O. 18 r. 2(1) to file the statement of defence becomes suspended and is reinstated only if the application for stay of proceedings is dismissed. Thus, the 14 days period to file the statement of defence only commences from the date of such dismissal. As such, the issue of judgment in default for not filing the statement of defence prior to the application for stay of proceedings does not arise.

Order 12 r. 10 (7) states:

> Order 18, rule 2(1) does not apply to **any defendant making an application under paragraph (1) or (2),** unless the application is dismissed and in which case, the defendant shall serve his defence within fourteen days after the dismissal of the application or within such other period as the court may order.

[37] In this regard, we are of the view that O. 12 r. 10(7) has no application in the present case as the second defendant's application for stay of proceedings was not made under O. 12 r. 10 paras. (1) or (2) but instead under s. 10(1) of the Act and O. 69 r. 10 Rules of Court 2012.

[38] Be that as it may, as discussed earlier, we are of the view that the second defendant had taken steps in the proceedings of the plaintiff's suit which disentitled it for the stay of proceedings.

Conclusion

[39] In conclusion, based on the above-mentioned reasons, we were of the view that the Judicial Commissioner had erred in allowing the stay of proceedings pursuant to s. 10(1) of the Act which warrants appellate intervention. In the circumstances, we unanimously allowed the appeal and set aside the decision of the High Court. We also ordered costs of RM15,000 to be paid by second defendant to the plaintiff subject to payment of the allocator fee.